IN THE

SUPREME COURT

OF THE

UNITED STATES.

C. W. Smith, as Receiver of the Atlantic & Pacific Railroad Company,

Plaintiff in Error,

vs.

Truman Reeves, as Treasurer of the State of California,

Defandant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This cause was originally commenced in the Circuit Court of the United States for the Northern District of California by three receivers of the Atlantic & Pacific Railroad Company (theretofore appointed by that court in an action therein pending) against the then treasurer of the state of California, J. R. McDonald. A demurrer and motion to dismiss were filed by the then defendant, and, upon a hearing before Judge McKenna, Circuit Judge, the demurrer was sustained. The original defendant having died, and C. W. Smith having been appointed receiver, as successor to the original receivers, an amended complaint was filed against the successor in office of McDonald, as treasurer, by Smith, as receiver, on an order substituting him as plaintiff and the successor of McDonald as defendant. To this amended complaint a demurrer was filed, and, upon a hearing before Justice Morrow, as Circuit Judge, this demurrer was sustained, and the action

dismissed, at the cost of the receiver. Subsequently, the present treasurer of the state of California was as the successor in office of the former defendant substituted as defendant by an order of the court duly made. This cause was taken by a writ of error from the judgment of the Circuit Court to the Circuit Court of Appeals, for the ninth circuit, and upon a hearing in that court, the judgment of the court below was affirmed, and this writ of error, is to bring for review to this court, the judgment of the United States Circuit Court of Appeals for the ninth circuit.

The facts stated in the amended complaint are substantially as follows:

The Atlantic & Pacific Railroad Company was incorporated by the act of congress approved July 27, 1866. Under this act of congress, one portion of the railroad chartered to be built, which is known as the "Western Division," was, prior to 1884, constructed from Isleta Junction in the territory of New Mexico, to the west bank of the Colorado river, at the crossing thereof provided for by its charter. Upon reaching this point it connected with a branch of a railroad built by the Southern Pacific Railroad Company, a corporation incorporated under the general statutes of California; approved May 20, 1861. This company, under its articles of incorporation and under the 18th section of the act of congress, approved July 27, 1866, and the joint resolution of congress, approved June 28, 1870, and the act of the legislature of California, approved April 4, 1870, constructed this branch road from its main line at Mojave to the Colorado river, a distance of about 243 miles and there connected with the Atlantic & Pacific Railroad (Western Division.)

On August 20, 1884, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railroad Company, (a Missouri corporation), the Atchison, Topeka & Santa Fé Railroad Company, (a Kansas corporation), and the Southern Pacific Railroad Company, entered into a written contract for the lease and sale of this branch line of road from Mojave to the west bank of the Colorado river, to the Atlantic & Pacific Railroad Company, under the provisions of the 2nd section of the act of the legislature of the state of California, approved April 3, 1880. [See appendix.] The Atlantic & Pacific Railroad Company took possession of this branch line of road, October 1st, 1884, under this contract, and from that time it, and its several receivers,

have been continually in possession of the same, operating it in connection with its western division.

This line of road from Mojave to the Colorado river, built by the Southern Pacific Railroad Company, formed at the date of this lease, a part of a large system of railroads in the state of California and elsewhere, owned by the Southern Pacific Railroad Company, which consisted of over a thousand miles of connected railroad in the state of California alone. By the terms of the contract, of lease and sale of August 20th, 1884, the Atlantic & Pacific Railroad Company was to pay the taxes levied upon any assessment of this leased line of road. No steps were ever taken under the contract of August 20th, 1884, to consummate the sale of this road, and since that time it has been operated by the Atlantic & Pacific Railroad Company and its receivers as a leased line, in connection with the line of the Atlantic & Pacific, which, in its turn, formed a link in the system of the Atchison, Topeka & Santa Fé Railroad Company.

That at the proper time, in the year 1893, the Southern Pacific Railroad Company, under and in pursuance of the provisions of section 10, article 13, of the constitution of the state, and section 3664 of the Political Code of the state of California (see *post*), returned to the state board of equalization of that state, a statement such as was required by said section 3664, for the purpose of enabling the state board to assess certain of its property. This statement included in it the *franchise, roadway, roadbed, rails and rolling stock of its entire railroad system in the state of California, including in it the line of railroad so leased to the Atlantic & Pacific Railroad Company.* This leased line, as well as other lines of the Southern Pacific, ran into more than one county in the state of California. Upon this return, the state board of equalization, at its August session in the year 1893, assessed the franchise, roadbed, rails and rolling stock *of all* the line of railroad returned by the Southern Pacific to it; and apportioned the total assessment so made of the property of the Southern Pacific Railroad Company, to the counties and cities through which the system owned by said company ran in the state, in accordance with the constitution and revenue laws of the state. Under this assessment, *the mileage of this leased line of railroad was a portion of the entire mileage of the Southern Pacific in the state (which, in its entirety, was,*

with its franchise, roadway, roadbed, rails and rolling stock, assessed as a unit at a lump sum, as the property of the Southern Pacific,) just the same as though it had not been leased, and the counties and cities through which the leased line runs were assigned the proportion of the total assessment of the entire Southern Pacific System, including "franchise, roadway, roadbed, rails and rolling stock" of such system in the proportion that the mileage of this leased line in such counties and cities bore to the entire mileage of the entire system in the state.

During all the time that the Atlantic & Pacific Railroad Company operated this leased line it used some portion of its own rolling stock upon it. This rolling stock was never permanently in the state of California, and was only transiently in it, and consisted of cars and locomotives, etc., running in and out of the state, constantly, and never permanently stopping in the state.

The state board of equalization at its August, 1893, meeting, against the objection and protest of the Atlantic & Pacific Railroad Company, assessed a portion of the Atlantic & Pacific Railroad Company's entire rolling stock alone and by itself, at the total value of $123,000, assessing it on the basis of $515.44 a mile of this leased line of railroad, and apportioned this assessment to the two counties, through which the leased line ran, at such rate per mile, to wit: At the rate of $515.44 per mile in each of the counties of Kern and San Bernardino. It, at the same time, had apportioned to each of these counties proper proportion of the assessment of the Southern Pacific system, as stated, upon the basis of the mileage of this leased line of railroad therein, at the aggregate sum of $9,303.95 per mile; included in the last assessment was a *pro rata* portion of the assessed value of the franchise, and the assessed value of all the rolling stock of the Southern Pacific. The state board, at the same session, levied upon this assessment of this rolling stock of the Atlantic & Pacific taxes in the gross sum of $2,272.80; and also levied upon the assessment of the franchise, roadway, roadbed and rolling stock of the Soutaern Pacific apportioned to these two counties taxes in the gross sum of $33,981.58, making a double assessment and taxation of rolling stock to this line of railroad.

This levy of $2,272.80 was paid to the state treasurer prior to June 1, 1894, by the receivers, who had then been appointed and had taken possession of the Atlantic & Pacific Railroad Company's prop-

erty at that time. The receivers of the Atlantic & Pacific then made a written demand upon the treasurer for the repayment of this amount so paid, under the provisions of section 3669 of the Political Code, [*see post*] and this action was commenced pursuant to the provisions of this section, to recover back the amount so paid, upon the theory that the state board of equalization had no jurisdiction to assess or to levy taxes upon any part of the rolling stock of the Atlantic & Pacific Railroad Company.

This case has had a somewhat peculiar history, in this: Upon the hearing before Judge McKenna, it was urged by the defendant; first: that the court had no jurisdiction, of the subject-matter of the action; second: that the facts stated in the complaint did not constitute a cause of action. Judge McKenna, overruled the claim of the defendant, that the court, had no jurisdiction of the subject-matter, of the action, but sustained the demurrer upon the other ground. [Tr. p. 22.] See, also, opinion of Judge Morrow, upon the hearing before him upon the demurrer to the amended complaint. [Tr. p. 27.]

From the opinion delivered by Judge McKenna, and also from the opinion delivered by Judge Morrow, it appears, that the demurrers were sustained, upon the theory, that, while the receivers of the Atlantic & Pacific Railroad Company, had the right to bring such an action, in that court, yet that the facts stated, in the complaint, and amended complaint, disclosed that the assessment, was a valid assessment, and, that, therefore, the taxes sought to be recovered were valid legal taxes, which company was legally compelled to pay. When the case reached the United States Circuit Court of Appeals, the defendant in error, (without having filed any cross petition in error), again raised the objection, overruled by Judge McKenna, that the court below, was without jurisdiction, to entertain such a cause of action, on behalf of plaintiff in error, and this contention, was sustained by the Court of Appeals, without passing upon the other question, and the decision of that court, affirming the judgment of the court below, was based solely, and entirely, upon the proposition, that the court below, was without jurisdiction, to entertain such a cause of action, on behalf of the receivers of the Atlantic & Pacific Railroad Company. [See opinion of Justice Gilbert, pages 36 to 41, inclusive, of transcript.]

SPECIFICATION OF THE ERRORS RELIED UPON.

1st. The United States Circuit Court of Appeals erred in determining that the Circuit Court of the United States for the northern district of California was without jurisdiction in said cause.

2nd. The United States Circuit Court of Appeals for the ninth circuit erred in determining that the Circuit Court of the United States for the northern district of California rightfully sustained the demurrer interposed in said cause by the late Levi Rackliffe, as treasurer of the state of California and predecessor in interest in said cause to W. S. Green, late treasurer of the state of California, and in place of whom was substituted Truman Reeves, the present treasurer of said state and defendant in error herein.

3rd. The United States Circuit Court of Appeals for the ninth circuit erred in affirming the judgment of the United States Circuit Court for the northern district of California, entered in the cause wherein C. W. Smith, successor of J. W. Reinhart, John J. McCook and Joseph C. Wilson, as receivers of the Atlantic & Pacific Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company; and Levi Rackliffe, as treasurer of the state of California and predecessor in interest of Truman Reeves as treasurer of the state of California, the defendant in said cause, dismissing said action at the cost of said C. W. Smith, as such receiver; all of which will fully appear by reference to the record attached to said petition in error.

POINTS, ARGUMENTS AND AUTHORITIES.

FIRST POINT.

The receivers of the Atlantic & Pacific Railroad Company had the right to bring an action, in the Circuit Court of the United States for the northern district of California, to recover any money due to the Atlantic & Pacific Railroad Company prior to their appointment, under the provisions of section 2, article 3, of the constitution of the United States, and the provisions of section 1 of the act of congress, approved August 13, 1888, regardless of the citizenship of the parties to the litigation.

I.

That the Atlantic & Pacific Railroad Company being a corporation created by the act of congress, approved July 27, 1866 [14 U. S. Stat., p. 292], had under the many decisions of this court the right to assert any cause of action, where the amount in value exceeded $2000, in any Circuit Court of the United States against any party, regardless of citizenship of the parties to such action, under the provisions of section 2, article 3, of the constitution of the United States, and the provisions of section 1 of the act of congress approved August 13, 1888, must, we think, be conceded.

Chief Justice Marshall, in the case of Osborn *v.* United States Bank (9 Wheat. 738), uses language which might have been written of and concerning the Atlantic & Pacific Railroad Company, as follows:

"The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law."

This question was again very carefully considered by this court in the Pacific removal cases (115 U. S. 1), and the doctrine enunciated

by Chief Justice Marshall affirmed. The proposition was again affirmed in the later case of N. P. R. R. Co. *v.* Amato (144 U. S. 465), and Sou. Kansas R. R. Co. *v.* Briscoe (144 U. S. 133).

II.

The Atlantic & Pacific Railroad Company having the right to invoke the jurisdiction of the federal courts, the receivers appointed to take possession of its property, and rights in action, were invested with the right to invoke the same jurisdiction.

T. & P. R. R. Co. *v.* Cox, 145 U. S. 593;

McNulty *v.* Lockridge, 141 U. S. 327.

We have presented this question at length because it is perfectly evident that (the proposition and authorities above cited were presented to the court below by the reply brief of the plaintiff in error) the court below misunderstood the position of the plaintiff in error, in this respect, as will be seen by the following quotation from the opinion of the court, delivered by Justice Gilbert, to wit:

"But we find a further and complete answer to the contention of the plaintiff in error. The jurisdiction of the United States court in the present case is not invoked upon the ground that the controversy presents a case arising under the constitution or laws of the United States." [Pr. Tr. p. 40.]

III.

These receivers having been appointed by the Circuit Court of the United States, for the northern district of California, to take possession of all the property, and rights in action, within that district, had the right to bring any suit, for the collection of the assets of the Atlantic & Pacific Railroad Company, in that court which had appointed them, regardless of citizenship, amount or anything else.

Porter *v.* Sabin, 149 U. S. 473;

White *v.* Ewing, 159 U. S. 36.

The court below, consisting of the same judges, in the case of Keihl *v.* City of South Bend (76 Fed. 921), had previously fully recognized this proposition, as will be seen from the first point in the syllabi of that case, which reads as follows;

"Where the subject matter of an action involves the acts and rights of a receiver appointed by a federal court, it constitutes a case arising under the laws of the United States, and is therefore within the jurisdiction of a federal court."

SECOND POINT.

Under the provisions of section 3669 of the Political Code of California, the Circuit Court of the United States for the northern district of California had the same jurisdiction of the subject matter of the cause of action stated in the amended complaint as a state court would have had.

I.

Section 3669 of the Political Code of the state of California reads as follows:

"3669. *Certain taxes must be paid to state treasurer.* Each corporation, person or association assessed by the state board of equalization must pay to the state treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the percentage added, if to be added, on or before the first Monday in June, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday in June, bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served on the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the county of Sacramento. * * *"

The decision of the court below, that the United States Circuit Court, for the northern district of California, has no jurisdiction of any cause of action, brought under the above statute, under any circumstances, is, we believe, erroneous. Section 629 of the revised statutes, as amended March 3, 1887, and corrected August 13, 1888 [25 U. S. Stat. 433], reads:

"The Circuit Court of the United States will have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

Under an unbroken line of decisions by this court, based upon substantially this statute, this court has always adhered to the proposition, that the grant to the federal courts of a jurisdiction "concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity" prevents any state, from confining the right created by statute or otherwise to bring a suit of a civil nature, at common law, or in equity, in the state courts alone, where a party, having the right to bring such suit, can invoke the aid of a federal court.

Suydam *v.* Broadnax *et al.*, 14 Pet. 67;

Union Bank *v.* Vaiden *et al.*, 18 How. 503.

The second point of the syllabi in the case of Hyde *et al. v.* Stone [20 How. 170], reads as follows:

"The jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power."

The second point of the syllabi in the case of Cowles *v.* Mercer County [7 Wall. 118], reads as follows:

"The statutes of a state limiting the jurisdiction of suits against counties to Circuit Courts held within such counties can have no application to courts of the national government."

See, also, the case of Broderick's Will. [21 Wall. 503.]

We quote, as quite applicable to the proposition contended for, from the opinion in the case of *Ex parte* McNiel [13 Wall. 236], as follows:

"It is urged further that a state law could not give jurisdiction to the District Court. That is true. A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maratime jurisdiction."

As was said by Justice Swayne in the case of Davis *v.* Gray [16 Wall. 203]:

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals. In the former he may hope to escape the local influence which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights."

See also:

County of Lincoln *v.* Luning, 133 U. S. 529;

Gaines *v.* Fuentes, 92 U. S. 10.

Justice Brown, in delivering the opinion of this court in the case of Cowley *v.* N. P. R. R. Co. (159 U. S. 568), uses this language:

"Although the statute of a state or territory may not restrict or limit the equitable jurisdiction of the federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the federal courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side."

See also, Chicot County Arkansas *v.* Sherwood *et al.*, 148 U. S. 529, in which the following language is used:

"If, therefore, the presentation of a demand to the county court under the Arkansas statute is not the commencement of a suit against the county, then, under the rule stated in Delaware County Commissioners *v.* Diebold Safe and Lock Co., just quoted, the court to which such demand may be carried after allowance or rejection receives and determines it as an original cause. In either case the suit is so maintainable in the state courts as to be cognizable by original process in a federal court, where the parties have the proper citizenship to confer jurisdiction. Any other view of the subject would prevent citizens of other states from resorting to the federal courts for the enforcement of their claims against counties of the state and limit them to the special mode of relief prescribed by the act of February 27, 1879. The jurisdiction of the federal courts is not to be defeated by such state legislation as this."

We quote from the opinion of Justice Brewer in the case of Reagan *v.* Farmers Loan & Trust Co. (154 U. S. 360), as follows:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of

the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. Mercer County Suprs. *v.* Cowles, 74 U. S. 7 Wall. 118 (19: 86); Lincoln County *v.* Luning, 133 U. S. 529 (33: 766); Chicot County *v.* Sherwood, 148 U. S. 529 (37: 546.)"

In Smyth *v.* Ames (169 U. S. 464), it is distinctly affirmed by Justice Harland, in his opinion based upon the many decisions of this court, that any one who has the right to go into a federal court and invoke its jurisdiction, may assert in such court, any right, that he could possibly assert in a state court, and that the state is powerless to enact any statute to prevent the assertion of such a right in a federal court.

The question was again reviewed by this court in the late case of Blake *et al v.* McClung *et al.*, (172 U. S. 239).

See also, cases in the Circuit Court of Appeals, 8th circuit:

Thompson *v.* Searcy County, 57 Fed. 1030;

Edwards *v.* Hill *et al.*, 59 Fed. 723.

THIRD POINT.

The state board of equalization of the state of California had no jurisdiction under either the Constitution or statutes of the state of California to make the assessment complained of.

I.

In our judgment, for the purpose of this case, it is not at all material to inquire into the question as to whether the rolling stock of the Atlantic & Pacific Railroad Company, which was assessed by the state board of equalization, and upon which the tax complained of was levied, was assessable or taxable in the state of California, it being sufficient for the purposes of this case, to show that the state board of equalization had no jurisdiction to assess it, as in such case the levy of the tax which was levied upon such assessment was absolutely void and entitled the plaintiff to recover under the statute referred to.

II.

Section 10, article 13, of the constitution, reads as follows:

"All property except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, road-way, road-bed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid out in such counties, cities and counties, cities, towns, townships and districts."

This section of the constitution is mandatory in its terms, and requires all property of every kind and description that can be assessed for taxation in this state to be assessed "*in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law,*" except certain classes of property belonging to railroads operated in more than one county in the state. The property of a railroad which is *operated in more than one county* in the state that is to be assessed by the state board of equalization, is specifically described, and all other property belonging to such a railroad must be assessed locally under the mandate of this provision.

To enable the state board of equalization to assess the "franchises," or the "roadway," or the "roadbed," or "the rails and rolling

stock" of any railroad, it must be the "franchise, the roadway, the roadbed, rails and rolling stock" of a railroad "*operated in more than one county in the state.*" These things are all in conjunction and make a complete whole; no one or more of them not belonging to, and not a part of a railroad "operated in more than one county in the state" can be assessed by the state board of equalization. At the time of the assessment in controversy the provisions of the act of the legislature of California approved March 31, 1891, (Stats. and amendments to codes of California, 1891, page 438), were in full force and effect, and sections 3665, 3666 and 3667 of the Political Code as amended by this act, read as follows, so far as this question is concerned:

"3665. * * * At such meeting the board must assess the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county. * * * Assessments must be made to the corporation, person, or association of persons owning the same. The depots, stations, shops, and buildings erected upon the space covered by the right of way, and all other property owned by such person, corporation, or association of persons, are assessed by the assessor of the county wherein they are situate. Within twenty days after the first Monday of August, the board must apportion the total assessment of the franchise, roadway, roadbed, rails and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The board must also, within said time, transmit, by mail, to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the said track within the county, or city and county, including the right of way, by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails and rolling stock of such railway within the state, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the fourth Monday in September the board of supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the state board of equalization within the county, the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxation district in the county, or city and county, through which such railway

runs, as fixed by the state board of equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors must transmit a copy of each order or equalization to the city council, or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment at the same rates, by the same officers and for the same purposes, as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the state board of equalization is dissatisfied with the assessment made by the board, such owner may, at the meeting of the board, under the provisions of section three thousand six hundred and ninety-two of the Political Code, between the first Monday in August and the first Monday in September, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it so as to equalize the same with the assessment of other property in the state. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment of the change made, and the auditor must note such change upon the assessment book or roll of the county, as directed by the board."

"3666. The state board of equalization must prepare each year a book, to be called 'Record of Assessment of Railways,' in which must be entered each assessment made by the board, either in writing or by both writing and printing. Each assessment so entered must be signed by the chairman and clerk. The record of the apportionment of the assessment made by the board to the counties, and cities and counties, must be made in a separate book, to be called 'Record of Apportionment of Railway Assessments.' In such last described book must be entered the names of the railways assessed by the board, the names of the corporation to which, or the name of the person or association to whom, each railway was assessed, the whole number of miles of the railway in the state, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, roadbed, rails and rolling stock, for purposes of state taxation, and the amount of the apportionment of such total assessment to each county, and city and county, for county, and city and county, taxation. Before the third Monday of September of each year, the clerk of the state board of equalization must prepare and transmit to the controller of state duplicates of the 'record of assessment of railways' and 'record of apportionment of railway assessments,' each certified by the chairman and clerk of the board, and to be known respectively, as 'duplicate record of assessment of railways' and 'duplicate record of apportionment of railway assessments.' In the last named duplicate, two columns must be added, in one of which the controller must enter the state taxes due the state upon the whole assessment, by each corporation, person, or association, and in the other the county, or city and county, taxes due upon the assessment apportioned to each county, or city and county, by each corporation, person, or association. The two duplicates constitute the warrant for

the controller to collect the state and county, and city and county, taxes levied upon such property assessed by the board, and the amount of the apportionment of the assessment to each county, and city and county, respectively."

"3667. When the board of supervisors of each county, and city and county, to which the state board of equalization has apportioned the assessment of railways, shall have fixed the rate of county, or city and county taxation, the clerk of the board of supervisors must forthwith, by mail, postage paid, transmit to the controller a statement of the rate of taxation levied by the board of supervisors for county, or city and county taxation. If the clerk fails to transmit such statement, the controller must obtain the information as to such rate of taxation from other sources. On or before the second Monday of October, the controller must compute and enter in separate money columns in the 'duplicate record of apportionment of railway assessments' the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the corporation, person, or association liable therefor, as the state tax upon the total amount of the assessment, and the county, or city and county, tax upon the apportionment of the assessment to each county, and city and county, of the property assessed to such corporation, person, or association named in said duplicate record."

It will be seen from the foregoing statutes that the legislature intended that the state board of equalization should assess "the franchise, roadway, roadbed, rails and rolling stock" of any railroad operated in more than one county as a unit, and in a total aggregate sum, to be divided by the total mileage of the road to which these several things belong.

In the earliest case, decided by the Supreme Court of California after the adoption of the new constitution [S. F. & N. P. R. R. Co. *v.* State Board of Equalization, 60 Cal. 12], that court had to determine several questions as to the duties of the state board of equalization, under this section of the constitution and statutes enacted to enforce it, similar to those above quoted, and we quote from the decision in that case as follows:

"Thus by the very language of the constitution all other but the railroad property mentioned must be assessed by the local assessors, in the manner prescribed by the statute; the railroad property must be assessed in the manner prescribed by the sections of the constitution. [8 Pac. L. J. 103.] * * *

"The constitution does not, in terms, require that the assessed value of each item should be separately *apportioned* to the several counties; and that the Political Code does not contemplate such separate distribution is sufficiently apparent from section 3650. That section provides that the assessor shall prepare an assessment book, in which must be specified in separate columns, under appropriate heads:

1. The *names* of persons assessed: *2.* Land by township, etc.; *3.* City and town lots; *4.* Personal property, showing number, kind, etc.; *5.* Cash value of real estate, etc.; *6.* Of personal property; *7.* Money; *8.* 'The assessment of the *franchise, roadbed*', etc.; such as may have been made by the state board and furnished to him; * * * *14.* Total value of all property. It thus appears that while as to assessments made by the assessor the kinds are to be separately stated, the assessment by the state board of the 'franchise, roadbed,' etc., is entered in one column and as a single item."

Again, in the case of People *v.* C. P. R. R. Co., (83 Cal. 406), the Supreme Court of California said:

"It will be borne in mind that the constitution provides for a difference in the mode of assessment only, not in the mode of levy or of collection of the tax on the property when assessed. Under the constitution, it became necessary, or if not necessary at least proper, for the legislature to pass laws providing the details for the assessment and apportionment of the assessment, of this class of property by the state board of equalization It is the only property in the state of which that board is authorized by the constitution to make assessment, and as the board is only authorized to make such assessment when the property is situate in two or more counties, apportionment thereof to the several counties became necessary. To provide for the details of that apportionment, and of notice to the several counties interested, it became necessary and proper that the legislature should act, and in so far as its action relates to the assessment and the apportionment thereof, it is not attacked as being in conflict with the constitution."

Again, in the case of R. R. Co. *v.* Mecartney, 104 Cal. 616, the court says: (The italics are ours.)

"Counsel for appellant cites several provisions from the code in regard to the assessment of railroads by the state board of equalization which seem to indicate that the roadway, roadbed, and rolling stock are to be valued together. This matter is fully explained in *San Francisco, etc., R. R. Co. v. State Board*, 60 Cal. 12. The constitution provides a mode in which the state board shall fix its valuations. This must be construed, so far as it differs from the general rule, as an authorized exception. In the above case reference is made to the code provisions requiring the county assessor to specify and separately assess different species of property, and it is said: 'It thus appears that while as to assessments made by the assessor, the kinds are to be separately stated, *the assessment by the state board of the franchise, roadbed, etc., is entered in one column and as a single item.*' "

In the very important case of The People *v.* C. P. R. R. Co., decided by the Supreme Court in bank, and reported in 105 Cal. 576, the court, speaking through Justice Harrison, in drawing the distinction between the assessment of property other than that required by

the constitution to be assessed by the state board of equalization and that required to be so assessed, used the following language (except we have italicized a portion of it):

"Such provisions are inapplicable to the railroads under consideration, so far as concerns that portion of their property which is assessed by the state board of equalization. It must be borne in mind that only a portion of their property, viz., the 'franchise, roadway, roadbed, rails and rolling stock, of railroads operated in more than one county, is thus assessed. The depots, stations, shops and buildings erected upon the space covered upon the right of way are assessed by the assessor of the county in which they are situated, and the taxes upon this property are collected in the same mode as are taxes from other individuals. The constitution provides that after the state board of equalization has made the assessment of the franchise, roadway, roadbed, rails and rolling stock at their actual value, the same shall be apportioned to the counties in proportion to the mileage in the different counties. It is the 'value of the property after it has been assessed that is to be apportioned to the several counties. There is no apportionment to the counties of the property itself or of any particular part of that property. Upon the assessment book of the several counties the assessment that is apportioned by the state board of equalization does not contain a description of the property within that county, or any designation of property upon which the taxes that may be levied could constitute a lien. Only the apportioned part of the assessed value is entered upon the books of the county auditor as the basis of the taxes to be levied with the county, the amount upon which the percentage of tax is to be computed, and from which is derived the amount of taxes to be paid by the railroad. The nature of the property required to be assessed by the state board of equalization shows that the property itself is incapable of being apportioned, and that there could be no description entered upon the books which could serve as the basis of a sale or conveyance. Even if the roadway within the county could be described there could be no apportionment to the several counties of the franchise or of the rolling stock which could serve as a description or be capable of transfer. *The franchise is a unit, and can be transferred only as a unit, and the rolling stock has no particular situs in any county, but, in connection with the roadway and roadbed, are essential for the enjoyment of the franchise, while the whole—the franchise, roadway, roadbed, rails and rolling stock—constitute an entirety incapable of division.* If the taxes for any county that are levied against the railroad upon this apportionment by the state board of equalization are delinquent there is no description of property within that county which can be advertised or incorporated into a certificate of sale and deed."

This case was affirmed by the Supreme Court of the United States in the case of C. P. R. R. Co. *v.* The People of the State of California, 162 U. S. 903.

These decisions of the Supreme Court of the States of California, in construing this constitutional provision, and these statutes must, by the federal courts, be read into the statute, as a part of them.

In Douglass *v.* County of Pike [101 U. S. 677], this court said:

"As a rule, we treat the construction which the highest court of the state has given the statute of that state as a part of the statute, and govern ourselves accordingly."

See, also, the late case of Long Island Water Supply Co. *v.* City of Brooklyn [166 U. S. 685], and cases there cited.

As was said by Justice Baker, in the case of Lapp *et al.* *v.* Ritter, [88 Fed. 108:]

"A decision by the highest court of a state, construing a statute of the state, is as binding upon the federal courts as though the construction so given had been written in the statute by the legislature itself."

III.

It is the rolling stock *of a railroad*, and not the rolling stock *used* on any railroad operated in more than one county in the state that is to be assessed by the state board of equalization. The rolling stock in question that was assessed was the rolling stock of the Atlantic & Pacific Railroad, which was not being operated as a railroad in the state of California, and did not run at any time into any county, much less into two counties of the state. The rolling stock assessed was used on a portion of a railroad having rolling stock of its own which had been assessed as a part of the line of road it belonged to and its total value apportioned along that portion of the line of road which had been leased

IV.

It will not be contended but that, if the right to make this assessment was beyond the jurisdiction of the state board, the tax levied upon this assessment was illegal; and, having been paid, can be recovered back.

In the well considered opinion of the Supreme Court in bank in the case of City and County of San Francisco *v.* C. P. R. R. Co., 63 Cal. 467, it was determined that the board had not the right to assess

the ferry steamers operating as a part of the Central Pacific Railroad in transporting people from its own line of road to the city of San Francisco.

In the case of Santa Clara County *v.* S. P. R. R. Co., 118 U. S. 394, this court held that where the state board of equalization of California included in its assessment of a railroad running into more than one county, the value of fences erected by the railroad company on its right of way, that such action vitiated the entire assessment and rendered it void.

In the cases commencing with the case of the People of the State of California *v.* C. P. R. R. Co. (all reported in 127 U. S. 1); the question came before this court as to the power of the state board of California (under a statute authorizing it so to do), to assess bridges, culverts, wharves, etc., under section 3665 of the Political Code, as amended by the act of March 9, 1883, with the other things to be assessed; and in that case, this court, speaking through Justice Bradley, of the jurisdiction granted to the state board by the constitution and statutes, says:

"The last section shows explicitly that, in regard to a railroad, the state board has power to assess only five things—the franchise, roadway, roadbed, rails and rolling stock; the county boards are authorized to assess all the rest of the property. If the state board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be *pro tanto* illegal and void."

Can it be said that the principle involved in the above decision would be any less applicable to a case where the state board has no jurisdiction over the railroad to which the franchise or the rolling stock belongs, but yet would proceed to assess either the franchise or the rolling stock? Again, suppose the state board should assess the franchise of a railroad company, as it assessed the rolling stock of the Atlantic & Pacific, although it did not own a foot of railroad in the state, would not such assessment be void and would not such franchise, if assessable at all, be assessable locally in each taxing district where the same was used?

V.

The court must bear in mind that the demurrer admits the facts to be that the railroad to which this rolling stock assessed belongs, had no existence in the state of California, and was not operated

therein, and that the railroad upon which the rolling stock was used, in this state, was assessed by the state board of equalization to its owner, in connection with the rolling stock belonging to it.

Assuming that this rolling stock was taxable in the state of California, it was taxable only on an assessment made by county or local assessors in the county and other municipalities in which it was used, and not upon assessments made by the state board of equalization, which had no authority on earth to assess rolling stock, except as it is part and parcel of a railroad that runs into, and is operated in more than one county in the state.

By the express terms of the constitution, as construed by the Supreme Court, "the franchise, roadway, roadbed, rails and rolling stock," are grouped together, and assessed as one thing, because each one is a necessary part and parcel of the complete thing, in which is vested certain public and private rights, and the evident intent of the constitution was that, when all these things existed together, and were used in more than one county, they should be assessed as one thing by the state board, instead of being assessed by local officers.

Under the facts admitted by the demurrer this case presents the fact that the state board of equalization assessed a lot of rolling stock belonging to a railroad corporation which neither owned nor operated a railroad in California (except as lessee) and assessed it *separately and independently from the franchise, roadway, roadbed and rails, of the railroad to which it belonged*, thereby usurping, as we think, the right and duty of the local authorities, if, under the facts alleged in the complaint, this property was subject to taxation in the state of California.

This litigation has been pending for several years in this state, and was undoubtedly brought home to the attention of the last legislature, which specifically amended the provisions of the revenue act so as to have a line situated like the Mojave line, assessed to the lessee, and to have the rolling stock used by the lessee upon it, assessed as part of the value of such leased line as though it belonged to it. [See amendment to Sec. 3665, Pol. Code, by act of legislature, 1897, appendix.] This, to say the least, is a legislative interpretation that the right did not exist prior to this statute.

VI.

The principles determined by the Supreme Court of the United States in the case of Marye *v.* Baltimore, etc., R. R. Co., 127 U. S. 117, are, we believe, precisely applicable and controlling in this case.

All of which is very respectfully submitted.

C. N. STERRY,

Attorney for Plaintiff in Error.

APPENDIX.

Section 2 of the acts of the California legislature, approved April 3d, 1880, reads as follows:

"Sec. 2. Railroad corporations doing business in this state and organized under any law of this state, or the United States, or of any state or territory thereof, have power to enter into contracts with one another, whereby the one may lease of the other the whole or any part of its railroad, or may acquire of the other the right to use, in common with it, the whole or any part of its railroad."

Sections 3664 and 3665 of the Political Code, as amended by the act of the legislature, approved April 1, 1897:

"3664. The president, secretary, or managing agent, or such other officer as the state board of equalization may designate of any corporation, and each person, or association of persons, owning or operating any railroad in more than one county in this state, shall, on or before the first Monday in April of each year, furnish the said board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year:

"1. The whole number of miles of railway in the state, and, where the line is partly out of the state, the whole number of miles without the state, and the whole number within the state, owned or operated by such corporation, person, or association;

"2. The value of the roadway, roadbed, and rails of the whole railway, and the value of the same within the state;

"3. The width of the right of way;

"4. The number of each kind of all rolling stock used by such corporation, person, or association in operating the entire railway, including the part without the state;

"5. Number, kind, and value of rolling stock owned and operated in the state;

"6. Number, kind, and value of rolling stock used in the state, but owned by the party making the returns;

"7. Number, kind, and value of rolling stock owned, but used out of the state, either upon divisions of road operated by the party making the returns, or by and upon other railways;

"Also showing in detail for the year preceding the first of January:

"1. The gross earnings of the entire road;

"2. The gross earnings of the road in the state, and where the railway is let to other operators, how much was derived by the lessor as rental;

"3. The cost of operating the entire road, exclusive of sinking fund, expenses of land department, and money paid to the United States;

"4. Net income for such year, and amount of dividend declared;

"5. Capital stock authorized;

"6. Capital stock paid in;

"7. Funded debt;

"8. Number of shares authorized;

"9. Number of shares of stock issued;

"10. Any other facts the state board of equalization may require;

"11. A description of any part or portion of such railroad which may be in the possession and control of any other railroad company or corporation, and operated by such other corporation under a lease or other contract;

"12. The president, secretary, or managing agent, or such other officer as the state board of equalization may designate of any corporation or association of persons operating in this state any portion of a line of railroad owned by and belonging to some other corporation or association, which runs in more than one county, shall make the same statement as is herein required to be made by the foregoing provisions of this section by the owner of such railroad;

"13. A description of the road, giving the points of entrance into and the points of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given, no other annual description thereafter is necessary, unless the road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold for taxes, either state or county, no other description is necessary than that given by, and the same is conclusive upon the corporation, person, or association giving the description. No assessment is invalid on account of a misdescription of the railway, or the right of way for the same. If such statement is not furnished as above provided, the assessment made by the state board of equalization upon the property of the corporation, person, or association failing to furnish the statement is conclusive and final. [*In effect 60 days from April 1, 1897.*]

"3665. The state board of equalization must meet at the state capitol on the third Monday in July, and continue in open session from day to day Sundays excepted, until the first Monday in August. At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county, but franchises derived from the United States shall not be assessed. Assessments must be made to the corporation, person, or association of persons owning the same. If any portion of any railroad, less than the whole is operated by some corporation or association of individuals other than the owner of such railroad, under lease or other contract, and such portion so operated runs into more than one county, the value of such part or portion of such railroad shall be assessed separate and apart from the balance of said railroad, and the board shall assess the roadway, roadbed, and rails of such portion of such railroad, together with the rolling stock used thereon by the corporation or association of individuals operating the same. The depots, stations, shops, and buildings erected upon the space covered by the right of way, and all other property owned by such person, corporation or association of persons, are assessed by the assessor of the county wherein they are situate. Within twenty days after the first Monday of August, the board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and coun-

ties. The board must also, within said time, transmit, by mail, to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the said track within the county, or city and county, including the right of way, by metes and bounds, or other descriptions sufficient for identification, the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the state, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the fourth Monday in September, the board of supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the state board of equalization within the county, the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxation district in the county, or city and county, through which such railway runs, as fixed by the state board of equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road or other district; and the clerk of the board of supervisors must transmit a copy of each order or equalization to the city council, or trustees or other legislative body of incorporated cities or towns, the trustees of each school district and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes, as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the state board of equalization is dissatisfied with the assessment made by the board, such owner may, at the meeting of the board, under the provisions of section three thousand six hundred and ninety-two, of the Political Code, between the first Monday in August and the first Monday in September, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it so as to equalize the same with the assessment of other property in the state. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment of the the change made, and the auditor must note such change upon the assessment book or roll of the county, as directed by the board." [*In effect 60 days from April 1, 1897.*